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2 IN THE UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF ILLINOIS
4 EASTERN DIVISION

4 MIMEDX GROUP, INC.,) Docket No. 16 C 11715
5)
5 Plaintiff)
6 Counter-Defendant,)
6)
7 v.) Chicago, Illinois
7) September 20, 2017
8 MICHAEL FOX,) 9:48 o'clock a.m.
8)
9 Defendant)
9 Counter-Plaintiff.)

10 TRANSCRIPT OF PROCEEDINGS - STATUS, MOTION
11 BEFORE THE HONORABLE SIDNEY I. SCHENKIER

12 APPEARANCES:

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23 NOTE: Please notify of correct speaker identification.
24 FAILURE TO SPEAK DIRECTLY INTO THE MICROPHONE OR MORE THAN
25 ONE PERSON TALKING AT A TIME MAKES PORTIONS INAUDIBLE.

1 APPEARANCES: (Continued)

2 For the Defendant:

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1 (Proceedings had in open court:)

2 THE CLERK: Case No. 16 C 11715, MiMedx Group, Inc.,
3 versus Fox. Status and motion hearing.

4 MS. MCGINNIS: Good morning, your Honor. Shanon
5 McGinnis on behalf of plaintiff, MiMedx Group, Inc.

6 MS. WYNNE: Good morning, your Honor. Ami Wynne on
7 behalf of the plaintiff.

8 MR. MAXWELL: Good morning, your Honor. Adam Maxwell
9 on behalf of the defendant Michael Fox.

10 MR. GRIESMEYER: Good morning, your Honor. Chris
11 Griesmeyer also on behalf of the defendants, Mr. Fox. And Mr.
12 Fox is here with us today.

13 THE COURT: Good morning. And we have an attorney by
14 phone?

15 MR. PREM0: Yes, your Honor. This is Stephen Premo,
16 Halunen Law, also representing Michael Fox.

17 THE COURT: All right. Welcome.

18 MS. MCGINNIS: Thank you.

19 MS. WYNNE: Thank you.

20 MR. PREM0: Thank you.

21 THE COURT: We have a number of things up this
22 morning. The things that I want to address in particular are
23 the motions for protective order and the motion to compel filed
24 by MiMedx in the joint Rule 26(f) report. I know there is a
25 defense motion as well. As I said in my order, I want to talk

1 about a schedule for how we are going to address that.

2 But looking first at the MiMedx motions, had there
3 been any further discussions or any developments that I need to
4 know about subsequent to the filing of the omnibus opposition?

5 MS. MCGINNIS: No, your Honor.

6 MR. MAXWELL: No, your Honor.

7 THE COURT: Okay. Let me take the motion for
8 protective order first. That motion addresses several
9 discovery requests that the defense served. One is request for
10 admissions, which I think -- is it 208 requests?

11 MS. MCGINNIS: 212, your Honor, yes.

12 THE COURT: Okay.

13 MR. MAXWELL: Yes, your Honor.

14 THE COURT: Well, I know your position would be
15 completely different if it was 208.

16 MS. MCGINNIS: It would. It would, completely
17 different.

18 (Laughter.)

19 THE COURT: And then a related interrogatory that
20 says, if you deny any of these, give us all sorts of
21 information about the denial. And then three requests for
22 production, 5 through 7, which asked for certain information
23 about documents that were reviewed at various times by you,
24 with you being defined as including counsel.

25 So I take a look at the request to admit. I take a

1 look at the interrogatory and read the positions that you've
2 asserted. So here is my ruling:

3 With respect to the request for productions -- I'm
4 sorry -- request to admit, I've read through them. There are a
5 number of them. There is no doubt about that. Interestingly,
6 in the last go around with the rules of civil procedure, there
7 was in the initial drafting a presumptive limit to the number
8 of requests to admit, which kind of got to the cutting room
9 floor.

10 And the reason for that, I think, is because you
11 couldn't agree on what it should be, and they're very case
12 specific, and not all requests for admission are equal. I
13 looked at these, and I think that each request is the kind of
14 particular bit of information. A number of them are about
15 establishing certain levels of foundation for documents but,
16 you know, specific enough bits of information that they're kind
17 of things they could be answered in a request to admit or they
18 could be answered by witnesses in depositions.

19 I don't really think that merely because there are
20 212 -- I take your correction -- numbered requests, that makes
21 them automatically improper. And when having read through
22 them, I'm sure you can pick out some that you may think aren't
23 appropriate. But in the main, I don't have any problem with
24 them. And so I'm going to deny the motion for protective order
25 as to the requests for admission.

1 As to the interrogatory, I grant the protective order.
2 There we do have a limit. We have a, you know, limit on
3 numbers of interrogatories. And it seems to me that if the
4 requests to admit are not admitted, then that's something
5 you'll be able to pursue if you wish in depositions. And some
6 of them you may have to. If they are with respect to documents
7 and you need to take depositions or otherwise use the rules to
8 establish foundation, then you'll have to do this.

9 But even if they didn't admit ten percent of them, you
10 know, we're already at 21. Then you ask for lots of
11 information about those. That's going to blow way past, I
12 think, the 25 interrogatory limit. And I don't think that's
13 the most provident use of the interrogatories.

14 So I am going to deny the motion for protective order
15 as to the -- I'm sorry -- grant it as to the interrogatory.

16 As to the request for production, these requests in 5
17 and 6 asked for any documents. Five, describe, concern or
18 otherwise relate to the allegations against Mr. Fox that
19 counsel for MiMedx reviewed when conducting the investigation.

20 Six is really the same thing, asking for that kind of
21 information with respect to what MiMedx counsel reviewed during
22 the time period between the termination and the filing of the
23 complaint. And then what Ms. Wynne reviewed prior to signing
24 the complaint.

25 The defense says, well, what's the big deal? I'm

1 asking for documents, documents that if they're not privileged
2 in the origin, they're not privileged simply because an
3 attorney reviewed them. Fair enough.

4 But you're not really asking them simply to produce
5 underlying documents. Your specific inquiry is, what did they
6 review. I don't see that's relevant to a single claim or
7 defense. If anything, it's a stalking course for a Rule 11
8 motion. And if you think you have a Rule 11 motion, send them
9 a Rule 11 letter.

10 MR. PREM0: Judge --

11 THE COURT: But you're not entitled to have discovery
12 that is solely dedicated to trying to develop a Rule 11 motion.

13 So I will grant the motion for protective order as to
14 request for productions 5 through 7. Because I'm granting in
15 part and denying in part the motion, I deny the request for
16 fees. You don't get fees for a split decision.

17 MS. McGINNIS: Thank you, your Honor.

18 THE COURT: So that takes us now to --

19 MS. McGINNIS: Your Honor, I'm sorry to interrupt.
20 But if I might, can we just establish a deadline for responding
21 to the request for admission --

22 THE COURT: Sure.

23 MS. McGINNIS: -- so there isn't any confusion there?

24 THE COURT: Sure.

25 MS. McGINNIS: If we could have 21 days?

1 THE COURT: Any objection?

2 MR. MAXWELL: We may have an objection based on we
3 had -- we had currently scheduled depositions. And we might be
4 -- we'd like to have answers to discovery prior to taking those
5 depositions. I'm not -- as of yesterday, counsel has
6 rescheduled those. So they're not set currently.

7 But as long as the -- the Rule 26(f) order and the
8 discovery deadline is sufficient to allow for it, there will be
9 no objection from us.

10 THE COURT: And by the way, I should have said this
11 before. If I could ask each of you when you speak to state
12 your name. And it's really for the record because if you ever
13 get a transcript, you want the court reporter to know who's
14 speaking. So thank you.

15 MR. MAXWELL: That was Adam Maxwell, your Honor.

16 MS. MCGINNIS: Shanon McGinnis, your Honor.

17 With respect to the -- the depositions, Mr. Fox had
18 previously -- about a week ago, MiMedx's deposition had been
19 set, and they canceled that. That pushed that back to early
20 November. The only one that we canceled was -- the only one
21 that was set was one of MiMedx's witnesses, and he's had a
22 conflict come up. And so we've asked that one.

23 The other two had not been set yet officially, and we
24 hadn't received new notices or -- or confirmation of the date.
25 So this shouldn't be a issue.

1 THE COURT: So 21 days from today would be October 11.
2 Is there any deposition that's set between now and October 11?

3 MS. MCGINNIS: No, your Honor.

4 MR. MAXWELL: No.

5 THE COURT: Then I don't think it's an issue. With
6 that, Mr. Maxwell, do you have any objection?

7 MR. MAXWELL: No, your Honor.

8 THE COURT: All right. October 11 to answer the
9 request for admission.

10 So that brings us then to MiMedx's motion to compel.
11 And we're talking about two categories. One is with respect to
12 certain discovery requests where, according to MiMedx, the
13 defense agreed to supplementation they didn't provide. And the
14 defense said, we didn't agree to this, but we have produced
15 more stuff. So I'm not really clear on exactly where we're at.
16 Let's take each of them in particular.

17 According to the plaintiff, there was an agreement to
18 further supplement the response to requests for production 31
19 to 43 based on a particular timeframe. I think it was July 1
20 of '12 going forward.

21 So my -- my question first is, is there -- was there
22 agreement from the defense perspective to do that?

23 MR. MAXWELL: Your Honor, Adam Maxwell on behalf of
24 the defendant.

25 It's a little more nuanced than that, your Honor. And

1 just to provide some background -- I guess the short answer is,
2 yes. But just to provide some background with respect to that.
3 Judge Shah had previously -- back up.

4 We -- we had brought this issue to Judge Shah and
5 discussed it briefly without filing motions and things.
6 Judge Shah had suggested that we meet and confer, which the
7 parties have done. And Judge Shah suggested that MiMedx
8 basically concoct a subject matter limitation.

9 We are willing to supplement the discovery based on a
10 reasonable subject matter limitation. However, MiMedx -- every
11 time they suggest a reasonable subject matter limitation, take
12 it to our client, and we can't get -- it's not -- it's not
13 reasonable. The -- the most recent subject matter limitation
14 is communications related to MiMedx.

15 So if -- if the subject matter limitation was as
16 Judge Shah suggested previously, if it was, for example,
17 communications relating to conduct that occurred while Mr. Fox
18 was employed, okay, we have a specific reasonable subject
19 matter limitation.

20 How about, conduct that was related to any of the
21 allegations in the complaint?

22 THE COURT: Can I stop you for a moment? Request 31
23 to 43 all asked for documents and communications between Mr.
24 Fox and certain specified people.

25 MR. MAXWELL: Yes, your Honor.

1 THE COURT: That's not a matter of subject matter
2 concerning MiMedx.

3 There is -- there is another alleged agreement -- and
4 I say alleged because I don't know if there is agreement
5 because I actually never saw in the various materials some
6 letter that documented the agreement. There is a reference to
7 phone calls where this happened.

8 And I'll tell you right now, if this is how we're
9 going to do things, then we're going to have a different way of
10 doing things. If this is a case where I have to order that
11 every meet and confer be in the presence of the court reporter
12 that you share the cost for, I'll do that.

13 MR. MAXWELL: Right.

14 THE COURT: That's like kind of getting put into the
15 corner. But if your conduct merits it, then we're not going to
16 have this issue.

17 But anyway, 31 to 43 are a definition of MiMedx. It's
18 a question, what -- what communications did you have with these
19 people.

20 MR. GRIESMEYER: Judge, Chris Griesmeyer.

21 If I could just shed further light on that. That is
22 exactly what we brought to the attention of Judge Shah. So --
23 so when he looked at those requests, he said, wait a minute --

24 THE COURT: Is there a transcript?

25 MR. GRIESMEYER: There is a transcript.

1 THE COURT: Did anybody give it to me?

2 MR. MAXWELL: Yes, your Honor. We -- I'm sorry, your
3 Honor. It's not -- it's not attached, but I do have it.

4 This -- this --

5 MR. GRIESMEYER: That's what Judge Shaw -- so Judge
6 Shah said, you don't get to --

7 THE COURT: One at a time.

8 MR. GRIESMEYER: Apologize. So Judge Shah basically
9 said, no, you can't ask him all communications with these
10 people. Communications seem to be limited. So he told MiMedx
11 to come up with a subject matter limitation, communications
12 about what. And so that's what the parties have been talking
13 about.

14 THE COURT: Go ahead.

15 MS. MCGINNIS: Your Honor, if I may, Shanon McGinnis.

16 I don't dispute that at all. The original request was
17 communications and documents between Mr. Fox and specific --
18 specific now former employees, or some might -- are still
19 current. And Judge Shah did say, you know, I think that's a
20 little too broad. Go back.

21 We narrowed it, and that's where the qualifier about
22 MiMedx was added. And that's what they agreed to was that they
23 would produce --

24 THE COURT: Do you have a document that shows their
25 agreement?

1 MS. McGINNIS: It's in a letter, your Honor. Hold on
2 a second. And it's attached. I'll find it for you.

3 THE COURT: And -- and so what is the defined -- what
4 is the limitation now with respect to these requests?

5 MR. MAXWELL: It is -- that's part of the problem,
6 your Honor, is that we -- we agreed to --

7 THE COURT: Tell me -- you know --

8 MR. MAXWELL: We agreed to supplement the
9 communications, your Honor. Adam Maxwell, excuse me.

10 We agreed to supplement the communications that relate
11 to MiMedx. But in that same vein, this sort of implicates the
12 ESI order. You don't have any search terms that, you know,
13 potentially -- that we can query an electronic device in this
14 regard.

15 So if we -- if we searched for just MiMedx, I don't
16 know that that would encompass all of the documents. So we've
17 been trying to work on agreeing on an electronically stored
18 information order so that we could supplement.

19 We did indicate in our letter that we don't have
20 responsive documents at this time. It may need to be
21 supplemented after the agreement on electronically stored
22 information letter.

23 THE COURT: So let me go back for a moment. With
24 respect to document request 31 to 43, what the plaintiff now
25 seeks are documents that are more targeted than the request

1 that is as phrased.

2 MS. McGINNIS: Correct, your Honor.

3 THE COURT: Tell me what that limitation is.

4 MS. McGINNIS: It is documents from the timeframe in
5 the request, which is January 2012 to the present, between
6 Mr. Fox and the specifically enumerated individuals that relate
7 to MiMedx. And that is in Exhibit 14 to our motion to compel.
8 Opposing counsel had indicated, as we discussed, with respect
9 to requests for production 31 through 43, we will produce post-
10 termination. And -- and then there was an e-mail after that
11 that indicates it's pre-termination as well. Correspondence
12 with Mr. Fox and the person's identified in your request to the
13 extent that correspondence discusses or relates to MiMedx.

14 THE COURT: So your issue isn't that you now disagree
15 with the limitation. But you say, to answer this, we need to
16 do searches for ESI, and we don't have yet a protocol or
17 agreement how to do that.

18 MR. MAXWELL: We will, your Honor, yes.

19 THE COURT: Okay.

20 MS. McGINNIS: And we'll say, your Honor, they have
21 already produced a handful of e-mails. So if they weren't
22 going to produce anything until there was an ESI agreement,
23 then that's something that should have been discussed.
24 Instead, you know, they could easily do a search for MiMedx in
25 Mr. Fox's e-mails. We're talking about his personal e-mails

1 and his personal text messages. That would at least be an
2 initial start.

3 The -- the letter says that they will endeavor to
4 supplement by August 18. And then they just didn't do so, and
5 they didn't have -- there is no further communication after
6 that.

7 THE COURT: I know. And endeavor means try.

8 MS. MCGINNIS: Well --

9 THE COURT: Right?

10 MS. MCGINNIS: But they didn't address it at all.
11 They didn't do anything. We asked them for it and that when --

12 THE COURT: I -- I --

13 MS. MCGINNIS: Yeah.

14 THE COURT: I understand. I understand.

15 So is there anything that would prevent you from
16 searching for this, the e-mails at this time, any e-mails or
17 texts between Mr. Fox and these particular people? I'm
18 focusing now on 31 to 42 --

19 MR. MAXWELL: Your Honor --

20 THE COURT: -- because 43 is a little bit different
21 because it's not a particular person.

22 MR. MAXWELL: Your Honor, Adam Maxwell on behalf of
23 Mike Fox.

24 The -- so Mr. Fox has gone through his e-mails and had
25 produced some documents, without the -- without the additional

1 search terms. Unless MiMedx just wants us to run a search for
2 MiMedx, then we can certainly do that. We can run a search for
3 just MiMedx and produce those documents.

4 With respect -- with respect to text message
5 communications, those phones or Mr. Fox's devices have not been
6 imaged or they're not searchable other than manually. And
7 if -- I'm not sure how we would go about searching for just
8 anything related to MiMedx in a bank of text messages on an
9 iPhone without imaging the phone.

10 Notwithstanding if you pulled -- pulled down the
11 search and type in MiMedx, if that's all they want is just text
12 messages responsive to MiMedx, we can certainly produce those.

13 MS. McGINNIS: Your Honor, if I may, Shanon McGinnis
14 on behalf of plaintiff.

15 I think it would be pretty easy to -- let's take
16 e-mails first, to go through e-mails and see what e-mails Mr.
17 Fox has with the enumerated individuals, and see if they relate
18 to MiMedx. Don't need search terms for that.

19 THE COURT: Well -- okay.

20 MS. McGINNIS: And same thing for the text messages.
21 His text messages are with certain people. So you open up the
22 text message on the phone. You scroll through. If there is --
23 I mean, we've had text messages produced in other cases with
24 the screen shot of text messages. It's not something that has
25 to be, you know, downloaded and a -- and a, you know, formal

1 search term run through.

2 THE COURT: Do we have any idea what the volume is if
3 you just did a search, you know, Mr. Fox and each of these
4 people?

5 MR. MAXWELL: Judge, Adam Maxwell on behalf of Mike
6 Fox.

7 Just to clarify --

8 THE COURT: Do you have an idea of the volume?

9 Every time I ask a question, you guys always have
10 something else you want to say instead of answering my
11 question. I think it will be better if you answer my question.

12 MR. MAXWELL: No, your Honor.

13 THE COURT: Okay. So have you like gone through
14 e-mails and say, let's just take one. And let's see if we ran
15 this, what do we get? And how many of these really have
16 anything to do with MiMedx as opposed to, let's go to lunch,
17 let's go to the Bulls game, because that also goes to whether
18 you ought to narrow it further with search terms; you know,
19 whether there is a burden that's imposed that's unfair in just
20 saying, give me every e-mail with these people.

21 Because you say, limited to MiMedx, but how do you do
22 that? You are either going to do it in some way through search
23 terms, or you're going to do it through manual review. And
24 that can be somewhat time consuming if it's a manual review.

25 MS. MCGINNIS: And -- and, your Honor --

1 THE COURT: And if that -- and that goes to my
2 observation over the years that everybody always thinks
3 everybody else's discovery obligation is very easy to do, but
4 that theirs is very complicated, a door that I found swings
5 both ways.

6 But maybe that's one thing that people ought to do
7 when they're making discovery requests is put themselves in the
8 other side's shoes and say, okay. If I had to do this, what
9 would I do? And how would I think it would be reasonable if I
10 had to do this to limit it and to tailor it?

11 So on this one, I think that maybe what we have to do
12 in terms of supplementing the things that they're going to
13 supplement -- because I don't think, as I am hearing it -- and
14 Mr. Maxwell can correct me -- that you're disagreeing about
15 what you would supplement. But what you are saying is that you
16 need to have some agreements or understanding about how you're
17 handling ESI, how you're going to search for these things in
18 order to do it.

19 MR. MAXWELL: That's correct, your Honor.

20 THE COURT: But we're going to address ESI in the Rule
21 26(f) planning report. So why don't we -- at this point I'm
22 going to grant the motion to produce the things that were
23 agreed to be produced. But we're going to hold off on setting
24 a deadline for that until we sort through some other things.
25 Okay?

1 MS. McGINNIS: Yes. Thank you, your Honor. Shanon
2 McGinnis.

3 THE COURT: Then -- then with respect to the second
4 part of the motion, that's interrogatory 10 in request for
5 production 47. And interrogatory No. 10 asks that the
6 defendant -- I should say, asks to identify any and all persons
7 and entities that you communicated with about the lawsuit and
8 describe in detail the date and substance of communications.
9 You is defined to include counsel.

10 So you want to know who their counsel talked to?

11 MS. McGINNIS: Shanon McGinnis, your Honor.

12 Yes, that's correct.

13 THE COURT: You want to tell them who you talk to?

14 MS. McGINNIS: Third parties? Yes, your Honor,
15 that's -- that's fine. That's what we're asking for here is
16 communications with third parties. We made it very clear that
17 we're not seeking --

18 THE COURT: Okay. Are you interested in who they talk
19 to?

20 MR. GRIESMEYER: It's probably work product. But I
21 don't think you get to know them as (inaudible) of counsel --

22 THE COURT: Well, but --

23 MR. GRIESMEYER: -- as to who they interview and --

24 THE COURT: Well --

25 MR. GRIESMEYER: -- talk to.

1 THE COURT: Well I know you guys never cited Mike
2 Wolbert (phonetic) of the EE0 -- or EE0C versus Jewel case,
3 which they cited. You didn't discuss that. Where, you know,
4 for better or for worse, you know, my assessment was simply the
5 fact that he interviewed somebody doesn't mean that you're
6 invading the work product. Just like if I say, I talked to my
7 client, that doesn't invade the privilege. It's knowing what I
8 talked to my client about that would do that. And in terms of
9 what you discussed to the third party, there certainly isn't
10 any attorney-client privilege.

11 Now, there may be an issue of work product. But I go
12 back to the proposition. You want to have an agreement that
13 everybody will produce whatever, identify what third parties
14 they may have interviewed about the case and provide the
15 substance of the information provided.

16 MR. MAXWELL: Your Honor, Adam Maxwell on behalf of
17 Mike Fox.

18 We didn't ask for that information.

19 THE COURT: I know. I know. But if there -- if
20 that's something you agree to, I'll let you ask for it.

21 MR. MAXWELL: Honestly, your Honor, I don't think we
22 need it or want it. I don't -- I don't really want to agree to
23 that.

24 THE COURT: You don't have to. I'm just asking.

25 MR. MAXWELL: Okay.

1 THE COURT: Okay. So with respect to the EE0C versus
2 Jewel decision, there are -- I guess, there is an aspect about
3 that decision that's a little different than here because in
4 that case -- well, maybe it's not different.

5 Let me ask you a question. If you had answered the
6 interrogatory to say, okay, here is who was talked to. Here is
7 what they said. Is there anything about the request that would
8 identify whether the person was interviewed or communicated
9 with by Mr. Fox versus by counsel?

10 MR. MAXWELL: Your Honor, I guess --

11 THE COURT: Do you understand what I'm asking?

12 MR. MAXWELL: I did not understand.

13 THE COURT: So -- so let's say that they asked, tell
14 me who you communicate with about the case and the substance of
15 it. So let's say you answered that and you had a list that
16 said, okay, here is five people. Here is the dates that there
17 were contacts. And here is what the third person said.

18 Is there anything about that request or that answer
19 that would disclose who of those five people counsel talked to
20 as opposed to Mr. Fox? Is there anything about the way it's
21 asked that would call for that, contrary to frankly the way you
22 asked, which is, tell me what the attorney did.

23 Interrogatory doesn't phrase it quite that way.

24 MR. MAXWELL: Your Honor, Adam Maxwell again.

25 Yes, your Honor. The -- the -- from my understanding,

1 based on our numerous meet and confers, is that counsel wants
2 us to designate who counsel spoke with versus who Mike Fox --

3 THE COURT: The interrogatory doesn't say that. And
4 right now you haven't provided any information with respect to
5 that interrogatory. You haven't identified anybody who anybody
6 talked to. So there isn't anything in the answer that would
7 automatically allow that to be determined.

8 I'm talking about interrogatory No. 10. Okay?
9 Interrogatory No. 10.

10 MR. MAXWELL: But, your Honor, Adam Maxwell.

11 Just to answer your question, no, then. My
12 understanding was mistaken. However, we -- we do have an
13 objection on the over-breadth nature or the overbroad nature of
14 the request to the extent that that -- that the request calls
15 for communications, for example, with Mr. Fox's girlfriend, his
16 ex-wife. I just don't think those are relevant.

17 THE COURT: Well, if -- I don't know if it's over-
18 broad because what Mr. Fox may say to people, if he says
19 anything to people -- maybe his attorneys tell him not to say
20 anything to people. I don't know. But if he says anything to
21 people, you know, isn't that potentially admission?

22 MR. FOX: I can't talk, can I?

23 THE COURT: So, you know, it is.

24 So I'm going to require the answer to interrogatory
25 10.

1 Now, with respect to document request No. 47, I don't
2 know if there are any documents concerning, you know,
3 interviews with -- that counsel may have had with third
4 parties. Certainly I think any attorney notes of that would be
5 privileged, would be work product. So but there may be other
6 things that aren't covered by work product.

7 So I will require you to answer that. And to the
8 extent that you think anything covered would be properly
9 withheld on the basis of work product, you can certainly assert
10 that and log it.

11 So I will grant the motion with that understanding as
12 to interrogatory 10 and request for production 47.

13 MS. MCGINNIS: Your Honor, can we set a deadline for
14 that as well?

15 THE COURT: Sure. How long would you like?

16 MR. MAXWELL: At least 21 days, your Honor.

17 MS. MCGINNIS: That's fine.

18 THE COURT: Is reasonable?

19 MS. MCGINNIS: Yeah.

20 THE COURT: You think it should be sooner?

21 MS. MCGINNIS: Well, no, 21 days is fine, your Honor.

22 THE COURT: Did you listen to anything I said?

23 MS. MCGINNIS: I am listening.

24 THE COURT: Just remember that the world is circular.
25 The wheel does turn.

1 MS. MCGINNIS: Yes. 21 days is fine, your Honor.

2 THE COURT: Okay. October 11.

3 All right. Let's turn to the Rule 26(f) planning
4 report. Sounds like it's too early to really talk about a
5 settlement conference. What I would suggest to you all is
6 that, unless this case is markedly different than just about
7 every other case, there will come a day when you have those
8 discussions. And I think it's always good to keep that in mind
9 as you litigate the case, so that in litigating the case you
10 don't unnecessarily do things that unduly complicate those
11 efforts when they come.

12 The second thing is to keep in mind the fact that
13 probably you will have a conference at some point, and to
14 really look at discovery and look at it carefully to identify
15 the earliest date possible to do that.

16 In other words, when do I know enough that we could
17 have a meaning -- meaningful conference? Knowing enough
18 doesn't mean knowing everything you would want to try the case
19 or to satisfy anybody's curiosity. But it means knowing enough
20 that you can sit down and meaningfully assess this. And my
21 observation is that you typically don't need 20-plus
22 depositions to do this.

23 So I just would suggest to you that you all keep that
24 in mind. Okay?

25 In terms of supplementing Rule 26(a)(1) disclosures,

1 the report suggests doing that September 21, tomorrow. That's
2 fine. So we will put that into the order.

3 I think that the biggest area of disagreement that I
4 saw in the report was with respect to the ESI issues. So
5 looking at the three areas of disagreement, I guess -- let me
6 take first the form of production. It wasn't clear to me
7 exactly what the disagreement is.

8 MR. MAXWELL: Your Honor, Adam Maxwell on behalf of
9 Mike Fox.

10 The -- the disagreement was that we suggested an
11 alternative method of production, including -- to include PDF.

12 THE COURT: Well, when you say an alternative method,
13 alternative, for instance, to native or TIF?

14 MR. MAXWELL: Correct, your Honor.

15 THE COURT: All right. So -- and when you're talking
16 about an alternative form, do you mean the same information
17 being produced in multiple forms? Or being able to ask for
18 category A in native but category B in PDF?

19 MR. MAXWELL: The former, your Honor.

20 THE COURT: Okay. I deny that. I mean, the rules
21 don't generally say you have to produce the same information in
22 multiple forms. And I don't see a compelling reason to do that
23 here.

24 MR. MAXWELL: Your Honor, Adam Maxwell.

25 If I -- if I may, the driving factor behind that was

1 more from our side a cost perspective in that if Mr. Fox can
2 apply reasonable search terms, maybe it would not be necessary
3 to image the -- a cell phone, for example, which costs about
4 \$700. And then produce -- you know, hire an outside vendor to
5 -- to produce those documents in TIF or a load file format.

6 THE COURT: So right now we're talking about, as I
7 understood it, a request that MiMedx produce things in multiple
8 ways. This issue didn't really address how Mr. Fox produces --

9 MS. MCGINNIS: That's my understand as well, your
10 Honor.

11 THE COURT: -- form of production. I don't know that
12 they have asked for things in a certain format from Mr. Fox?
13 If in your discussions there is a format that they seek but you
14 say, well, that's more expensive. We could give you it in this
15 format. It's usable by you and it's less expensive for us.
16 That's a discussion to have.

17 MR. MAXWELL: Okay. Thank you, your Honor. That's --

18 THE COURT: Because this particular -- as called out
19 in the 26(f) report, it really applied to MiMedx' production.

20 MR. MAXWELL: I understand, your Honor, and I
21 understand how that can be interpreted by MiMedx in that
22 manner. It was a mutual provision in the -- in the ESI order.

23 THE COURT: Well, I guess what I would say is, I would
24 resort back to Rule 34, that the party seeking information can,
25 you know, request that it be in a particular form. And if the

1 responding party says, that's not the form we should use, then
2 the parties have to have a discussion about that.

3 But -- I -- I don't know at this point, without
4 knowing what's being sought, what the alternatives are, that
5 it's really appropriate for me to weigh in and say, it's got to
6 be this way or got to be that way.

7 MR. MAXWELL: Understood, your Honor.

8 THE COURT: To borrow one of your phrases, it may be
9 more nuanced.

10 MR. MAXWELL: Maybe.

11 THE COURT: Now, then there is the issue of electronic
12 device comparison. I guess it's subpart 2 under areas of
13 disagreement. So, as I understand it -- and I just want to lay
14 this out to make sure I am understanding it correctly. What
15 this pertains to are, I guess, certain devices or images of
16 devices that were made as part of certain devices being turned
17 over by Mr. Fox to MiMedx?

18 MR. PREMO: Steven Premo.

19 MS. MCGINNIS: Yes, your Honor.

20 MR. PREMO: That's correct, your Honor.

21 THE COURT: Right.

22 MS. MCGINNIS: Shanon McGinnis.

23 Those are devices --

24 THE COURT: Like --

25 MS. MCGINNIS: -- that he had imaged before he turned

1 them over to MiMedx.

2 THE COURT: Okay. All right. And so StoneTurn now
3 has those images?

4 MS. McGINNIS: Correct, your Honor.

5 THE COURT: StoneTurn, Mr. Fox's vendor, correct?

6 MS. McGINNIS: Correct, your Honor. Shanon McGinnis.

7 MR. PREM0: Correct. Correct, your Honor.

8 THE COURT: All right. So what I understand the
9 defense to be saying is, so now MiMedx has with respect to
10 these particular devices, the devices and the software on the
11 devices. And what the defense is proposing, I guess, is that
12 the experts or the consultants on each side do a comparison to
13 make sure that what is on the devices that MiMedx now has that
14 StoneTurn imaged, that they match.

15 MS. McGINNIS: Your Honor, Shanon McGinnis.

16 They're suggesting that compare the two images. DTI
17 and MiMedx's vendor made a mirror image as well. So, yes.

18 THE COURT: And that's fine. So -- but an image of
19 those devices. So you would expect that the DTI -- well, you
20 want -- they want to see if the DTI image matches the image
21 that StoneTurn made.

22 MS. McGINNIS: Correct, your Honor.

23 THE COURT: Okay. Now -- and that -- this applies to
24 a subset of all of the sources of ESI that MiMedx may wind up
25 looking --

1 MS. MCGINNIS: Shanon McGinnis.

2 Correct, your Honor. It --

3 THE COURT: The specific devices that Mr. Fox had.

4 MS. MCGINNIS: The devices that were in Mr. Fox's
5 possession. Yes, your Honor.

6 THE COURT: Okay. Now, you guys have a disagreement
7 about whether Judge Shah held forth on what use could or should
8 be made of the images being held by StoneTurn.

9 MS. MCGINNIS: Correct, your Honor.

10 THE COURT: According to the plaintiff, Judge Shah
11 said that they are not to be looked at except under certain
12 circumstances, none of which are present here. The defense
13 says, the issue has not been ruled on.

14 Now, you both may be correct. I don't know, because I
15 don't know what you mean, Mr. Maxwell, by the issue has not
16 been ruled on. So let me go back and kind of start with this
17 proposition.

18 Did Judge Shah discuss what use may be made of the
19 mirror images held by StoneTurn?

20 MS. MCGINNIS: Yes, your Honor. Shanon McGinnis.
21 Judge Shah's preliminary injunction order.

22 THE COURT: Okay. Okay. Do you agree that he
23 addressed that in the injunction order?

24 MR. MAXWELL: Your Honor, Adam Maxwell.

25 Somewhat. He -- he said that the images are not to be

1 accessed prior to turning them over, and that -- now, the order
2 doesn't say this. But Judge Shah said that if in discovery you
3 need to request that information, then issue a discovery
4 request, which is what we've done.

5 And ironically, counsel for MiMedx is the one who
6 requested a copy of the devices from Mr. Fox from StoneTurn.
7 And in response to counsel's request for those images, Judge
8 Shah said, issue a discovery request, if that's what you would
9 like.

10 That's -- that's undisputed. It is at the March 8
11 hearing on page 19 of the transcript.

12 MS. MCGINNIS: Your Honor, if I may, Shanon McGinnis.

13 We didn't issue a discovery request for those devices
14 because the Court ordered them that those images were not to be
15 accessed, used, anything. The Court then provided the
16 appropriate assurances that we were looking for. So we did not
17 issue a discovery request for them. There is not a document
18 request or an interrogatory or anything about them.

19 What the Judge did say, what Judge Shah did say, was
20 that if at some point down the road there was an argument that
21 the plaintiff MiMedx had not fully complied with the discovery
22 request or was hiding the ball about data, then at that point
23 there may be an argument that somebody should be allowed to
24 look at the images and confirm what's on there. He said, at
25 that point he wasn't convinced that they needed assurances at

1 this point that the images were successfully duplicated.

2 MR. MAXWELL: Your Honor, that was the -- that was not
3 counsel's request for a copy of the devices. That was prior
4 to -- or was not prior to Judge Shah's ruling. But subsequent
5 to that, counsel requested. She specifically stated, I
6 understand your Honor's order, but they get to maintain a copy
7 of or get to maintain whatever they copied. And they can't
8 access it. That's what I was talking about.

9 THE COURT: They can't access it.

10 MR. MAXWELL: They can't access it.

11 We're not accessing it. Counsel said, is it possible?
12 We would request that we would be permitted to have a copy of
13 what they have, so that again it can be maintained in an
14 evidence vault, the same way that theirs is.

15 That's all we're asking for. And Judge Shah said, if
16 you want to make a request through ordinary discovery
17 mechanisms of that kind of thing, you can meet and confer about
18 it and see if you can reach some kind of agreement. We've met
19 and conferred, but we can't reach an agreement.

20 MS. MCGINNIS: We didn't make a request, though, your
21 Honor, is -- is the point that I was trying to make.

22 THE COURT: I know, but they're making a request.

23 MS. MCGINNIS: But they're making a request that
24 allows them to --

25 THE COURT: Well, who is them?

1 MS. MCGINNIS: Allows Mr. Fox to --

2 THE COURT: Who --

3 MS. MCGINNIS: -- access.

4 THE COURT: No.

5 MS. MCGINNIS: His vendor. It allows his vendor to
6 access. But the -- the safeguards that Judge Shah had in place
7 are not -- are not present here.

8 THE COURT: So let me -- I understand -- you
9 understand that what they seek is to make sure that there isn't
10 any dispute about the integrity of the image from the devices
11 that were obtained back from Mr. Fox when you do the searches.

12 MS. MCGINNIS: When -- the way that I take the
13 request, your Honor, is that they take issue with the images
14 that DTI made.

15 THE COURT: No, no, no. I don't know that they take
16 image -- they take issue. What they want to do is, rather than
17 have a fight after production, when somebody says, gee, I know
18 there was more there. I don't know why we're not getting this
19 because there was more there -- to at the front end to ensure
20 through experts looking at it that they match up, and if there
21 are discrepancies to vet that.

22 MS. MCGINNIS: Two points, if I may, your Honor.
23 Shanon McGinnis.

24 Judge Shah specifically addressed that. His -- his
25 order was that let's take discovery in the normal course of

1 business. There is no suggestion at this point that we
2 haven't --

3 THE COURT: But he --

4 MS. McGINNIS: -- produced something on --

5 THE COURT: He gave this to me for discovery.

6 MS. McGINNIS: I understand.

7 THE COURT: So I am going to look at this in a way
8 that hopefully can avoid issues on the back end.

9 MS. McGINNIS: Okay.

10 THE COURT: Because from what I'm seeing here, left to
11 your own devices, no pun intended, you guys will fight forever.
12 So I think you need to be reined in.

13 Do you not trust StoneTurn to work with DTI?

14 MS. McGINNIS: That's not it at all, your Honor.
15 My --

16 THE COURT: Okay.

17 MS. McGINNIS: My point with this is that I'm not sure
18 what StoneTurn had. If the document at the time that they had
19 the documents, there were --

20 THE COURT: The devices.

21 MS. McGINNIS: -- security protocols -- the devices.
22 Thank you. Sorry.

23 At the time they had the devices, there were security
24 protocols in place. So I'm not sure what -- what StoneTurn
25 had. And I think that depending on -- you know, there is a

1 greater chance that -- that it might not match up. Maybe
2 StoneTurn has less. Maybe StoneTurn doesn't have anything.

3 But I think that there is a greater chance of there
4 being a dispute at that point than trusting us to have a
5 reputable vendor image the devices, make the production.

6 THE COURT: Well, the devices have been imaged.

7 MS. MCGINNIS: They have been imaged.

8 THE COURT: All right.

9 MS. MCGINNIS: But to have -- have a production made
10 from the images. And -- and then if there is a point of, hey,
11 we thought that this might have contained additional documents,
12 to have that discussion.

13 THE COURT: Yeah. Well, based on what I'm seeing, as
14 night follows day that's what's going to happen. So if you
15 tell me you don't trust StoneTurn, then, you know, what I would
16 do is I would have each of them get together and pick a third
17 vendor to compare. You can share the cost of that.

18 MS. MCGINNIS: Your Honor, would the -- and this is a
19 technology question. I don't -- I don't know the answer of
20 whether or not this comparison would allow anybody to see the
21 documents, access the images, because that's something that
22 Judge Shah's order expressly says that's not permitted.

23 MR. MAXWELL: Your Honor, we have addressed this ad
24 nauseam in meet and confers.

25 THE COURT: You know, I am really tired of hearing

1 about everybody criticizing everybody else right now. Do you
2 think that that's persuasive? Whether you think it's ad
3 nauseam, whether she thinks you're holding back, do you think
4 any of that is persuasive?

5 MR. MAXWELL: No, your Honor. And --

6 THE COURT: Okay. Maybe they are with some judges.
7 I'm telling you right now, it's not with me. So let's stop it.

8 MR. MAXWELL: I apologize, your Honor. Adam Maxwell.

9 I just wanting to establish that we had -- we had in
10 fact explained that the documents on the imaged devices would
11 not be viewed.

12 MR. GRIESMEYER: Judge, Chris Griesmeyer on behalf of
13 Mr. Fox.

14 Just to provide further context, so what happened
15 after Mr. Fox received the complaint, he immediately turned
16 over (inaudible) three MiMedx devices in his possession. He
17 immediately turned them over to StoneTurn for evidence
18 preservation purposes.

19 They created an image. StoneTurn then gave the
20 devices to DTI. DTI took the devices, created an image. What
21 I explained to Ms. McGinnis is that what we just want to do, we
22 want to make sure that the image that DTI has is the same thing
23 that StoneTurn has and is working off the same image, after
24 which -- and I've explained that we don't need to see anything
25 that's on either one of those devices. Just want the two

1 experts to get in the room, make sure everybody is working off
2 the same page, after which they can have the StoneTurn devices.
3 We don't want them. We don't want to access them.

4 THE COURT: Images.

5 MR. GRIESMEYER: The images, yes.

6 I've explained all this. And she doesn't want to
7 allow that type of comparison. That's exactly what I want to
8 do. I just want to avoid any type of evidentiary dispute that,
9 well, listen, you're pulling, you know --

10 THE COURT: I think I understand.

11 MR. GRIESMEYER: Thank you.

12 MS. MCGINNIS: Your Honor, Shanon McGinnis.

13 THE COURT: Yes.

14 MS. MCGINNIS: Judge Shah's order, if -- if this
15 involves accessing or manipulating or using the mirror image
16 that StoneTurn has, then it's in violation of the preliminary
17 injunction order, because that specifically states that -- that
18 the images cannot be accessed, used, manipulated, viewed,
19 anything along those lines. The mirror image, documents on it
20 or the data or the image itself.

21 THE COURT: Well, that's why I asked you if you don't
22 trust StoneTurn. And if your answer is, I don't, then fine.
23 We'll have the two experts get a third party, a different
24 vendor. And I'm happy to have an order that says that this is
25 simply to compare -- really I think we're comparing bits and

1 bytes. But it's not in any way a review of any of the content
2 of any of the information.

3 So, you know, I'll -- I'll be guided by the plaintiff
4 in terms of whether you have concern because StoneTurn was
5 engaged by Mr. Fox to be the consultant. If you don't trust
6 StoneTurn, then get somebody else.

7 MS. MCGINNIS: I -- I am inclined to go then with a
8 third-party vendor, your Honor --

9 THE COURT: Okay. Have the two --

10 MS. MCGINNIS: -- experts can agree.

11 THE COURT: Have the two of them pick a third.

12 MR. MAXWELL: (Inaudible) vendors?

13 THE COURT: Yes.

14 MR. MAXWELL: -- (inaudible) StoneTurn.

15 THE COURT: Yeah, the two -- two vendors pick a third.

16 MS. MCGINNIS: Your Honor, may I inquire further on
17 that? Will -- will there be -- and again this is the
18 technology issues that I'm not sure. Will a file list be
19 created that goes to counsel or to Mr. Fox? That -- that's my
20 concern -- that's my concern is that there is a -- you know,
21 somehow any of the information that's contained on the
22 StoneTurn -- that the StoneTurn mirror image be provided to --
23 to counsel or to -- to the parties? Because the Court has --

24 THE COURT: You're --

25 MS. MCGINNIS: -- indicated --

1 THE COURT: -- talking about the -- you're talking
2 about the contents. That's your concern.

3 MS. McGINNIS: Yes.

4 THE COURT: All right.

5 MS. McGINNIS: But that would include like the names
6 of documents. So --

7 THE COURT: That's not what we're talking about.

8 Correct, Mr. Maxwell?

9 MR. MAXWELL: That's my understanding, your Honor.

10 MS. McGINNIS: But how do they compare what's on each
11 device if they don't look at the documents, or even a name of
12 documents, a file list that shows --

13 THE COURT: Well, the first --

14 MS. McGINNIS: -- the documents are.

15 THE COURT: At the first level I would expect that
16 what you're doing is looking at the architecture of it. You're
17 looking at, you know, does this one have, for instance, so many
18 bytes of information, this one half as much?

19 MS. McGINNIS: Okay.

20 MR. MAXWELL: That's correct, your Honor.

21 THE COURT: The same amount? So -- but I -- I think
22 that since what Mr. Maxwell is assuring is that none of this
23 involves any kind of review of the contents, including titles
24 of documents or dates of documents or anything like that. For
25 that you have to have a protocol for this comparison.

1 MR. MAXWELL: Correct, your Honor.

2 THE COURT: And that the protocol be put together by
3 the expert, like a consultant, with the participation of the
4 attorney. Okay?

5 MS. McGINNIS: Understood, your Honor.

6 THE COURT: All right. So that's how we're going to
7 handle that issue. And then the third issue is a data
8 repository issue. So I -- I was trying to work my way through
9 the red-lining and such on attachment A to Exhibit 1. I'm
10 trying to figure out what it is the defense wants. And I
11 assume that what's going to happen is, you're going to have a
12 conversation. And you're going to say, okay, on the defense --
13 on the plaintiff's side, here are the custodians. Here are the
14 databases that we think are most reasonably likely to have
15 relevant information.

16 You'll say, fine. Or you'll say, well, wait a minute.
17 What about this other one? And you'll have a conversation.
18 And either you'll agree or I'll rule. And then once you have
19 those databases custodians determined, you're going to say,
20 okay, what are we going to look for?

21 And I -- the report suggests that you are going to use
22 search terms, right?

23 MR. MAXWELL: Correct, your Honor.

24 MS. McGINNIS: Correct.

25 THE COURT: Have you had any conversation about that?

1 MR. MAXWELL: We have not, your Honor.

2 THE COURT: Okay. So you're going to have search
3 terms. And you're going to talk about the search terms. And
4 then you're going to have hopefully agreement on the search
5 terms. And if you don't, you're going to have agreement on
6 some number of them. And then there is going to be a debate,
7 well, should we have this other one, or should we have some
8 kind of connector with this one because without a connector
9 it's going to be too broad.

10 And you're going to have agreement on search terms.
11 Either you'll agree or it will be imposed on you. And then
12 you're going to do a search, right?

13 MS. McGINNIS: Uh-huh.

14 THE COURT: So let me stop for a moment. Is it your
15 anticipation that once you have the search terms and the time
16 parameters and such, and you got the databases, you're just
17 going to run them against all the databases? Have you --

18 MS. McGINNIS: The --

19 THE COURT: -- thought about that?

20 MS. McGINNIS: They would be searched by custodians --

21 THE COURT: Well --

22 MS. McGINNIS: -- so that the documents --

23 THE COURT: I understand that you have different
24 e-mail custodians, at least a dozen based on request for
25 production 31 to 42. But what I have done or suggested in the

1 past is that once you have the search terms, that instead of
2 doing all of the searches or all of the databases, you run it
3 as a sample against one of them, and maybe not for the entire
4 time period. But to see what you get, because, you know, you
5 may wind up as, you know, smart attorneys with clients
6 knowledgeable about how people talk and what words may hit on
7 things. But until you run it, you don't know.

8 And if you run it and you say, gee, now, I can see
9 that this particular search term generated 90 percent of the
10 hits, and in looking at the 90 percent of the hits 99 percent
11 of those are worthless, doesn't that tell you something you
12 want to know before you run it against anything else?

13 MS. MCGINNIS: Uh-huh.

14 THE COURT: So I would suggest that to you as a -- as
15 a means of potentially verifying that you've got the right
16 terms or vetting those to see how you might adjust them before
17 you run it on everything. And then it's kind of harder to take
18 a look at everything. So I would suggest that to you.

19 But so -- so then they would do that process. There
20 would be so many documents generated ultimately. They would
21 review them. They would determine what's responsive. And to
22 the extent it's not privileged or they didn't assert privilege
23 they produce it. Okay.

24 And on the same -- and you would be doing the same
25 thing on your side of the case but with fewer sources. Fair?

1 MR. MAXWELL: Yes, your Honor.

2 THE COURT: Okay. So what is the data repository that
3 you have in mind that you want? And I don't know that data
4 repository is really the right word, term. What do you -- what
5 is it that you want them to do and give to you beyond what I
6 have discussed?

7 MR. MAXWELL: Your Honor, Adam Maxwell on behalf of
8 Mike Fox.

9 We suggested in the ESI order to identify custodians
10 and custodians' devices basically.

11 THE COURT: Well, and I think that that's part of what
12 was embraced by what I said, right? You're going to have a
13 discussion, identify custodians and sources.

14 MS. MCGINNIS: The -- the detail that they want,
15 however, is much more. Yeah.

16 THE COURT: Okay.

17 MR. MAXWELL: That's fine, your Honor. We -- we can
18 agree to custodians and sources without the make, model, you
19 know, serial number, things like that. That wasn't broached
20 previously. But --

21 THE COURT: I'm glad I can be of help.

22 MR. MAXWELL: It's very helpful, your Honor.

23 THE COURT: You shouldn't have to have a chaperoned
24 conversation.

25 MR. MAXWELL: I agree, your Honor, hundred percent.

1 So that -- so that's essentially what we had suggested is a
2 schedule in the ESI order for things like that.

3 THE COURT: Well, okay. That's then at the front end
4 of identifying who are the custodians and what sources are we
5 looking at.

6 Then as they go through the process, it seemed as
7 though your proposal was that there be certain documentation
8 that they maintain of that process and then provide to you.
9 Did I read that incorrectly?

10 MR. MAXWELL: No, your Honor. Adam Maxwell.

11 THE COURT: Why is that?

12 MR. MAXWELL: Your Honor, it's sort of in the same
13 vein as you had suggested with respect to running a sample
14 through one custodian's repository, for lack of a better word.
15 And my understanding from prior experience with some of these
16 vendors is that they will generate a report. It's essentially
17 an Excel file that says, you know, here are the numbers of
18 hits.

19 THE COURT: It's a hit list.

20 MR. MAXWELL: Yeah, hit list. So that's what was --

21 THE COURT: Well, but let me go back for a moment. If
22 they run a sample and they say, this is fine. You know, it's
23 in response to stuff. So we'll run against everything. We'll
24 produce it to you. What do you care about the hit list?

25 If they say, whoa, this is getting way too much stuff,

1 then in order to persuade you that they need -- that there has
2 to be a limitation, then I would expect they're going to show
3 you the hit list. Because in the end, if they don't, why are
4 you going to agree? If you don't agree, then you're going to
5 have to come to me. And what are you going to have to show me?

6 MR. MAXWELL: Adam Maxwell, your Honor. I agree.

7 THE COURT: Okay. So it seems to me that we can make
8 this simple. And the real lifting is at the front end of who
9 the custodians are, who are the sources, what are the terms
10 we're going to use. Let's run it against the sample. Let's
11 see what it generates. Let's see what revision we have to do.
12 And then once that's all sorted out -- hopefully on your own,
13 but if not then with assistance -- then you're going to run it
14 against everything.

15 And then it's going to be producing what's responsive,
16 except for whatever you're asserting privilege on and producing
17 a log. I think we can make it a little more simpler at the
18 back end by doing the work at the front. So that's how I
19 resolve that issue.

20 Now, that takes us to deadline for discovery. So the
21 report says, plaintiff proposes February -- I'm sorry --
22 December 15. Defense proposes April 13. So I have to say,
23 given that we're getting to the end of September, we have less
24 than three months between now and December 15.

25 I have not seen anything that tells me it's realistic

1 to say you're going to have these conversations, you're going
2 to work this stuff out, you're going to finish off the written
3 discovery. You're going to take collectively 15 or 20
4 depositions and get that done in the middle of the holiday
5 season. It just doesn't seem like it works.

6 MS. MCGINNIS: We had as an offer of compromise, your
7 Honor -- Shanon McGinnis.

8 In here we had offered the middle of January as well
9 as a cutoff.

10 THE COURT: All right. Okay. Not exactly Solomonic.

11 Well, let's talk for a moment, before we get to the
12 schedule, about a couple other things. At this point I'm not
13 going to authorize more than ten depositions a side. I mean,
14 one of the things that I saw in the report from the defense
15 perspective is, you may want 12, and a number of these are
16 third parties. And at least my experience is that sometimes
17 once you embark on that process, kind of like witnesses at
18 trial, you decide I don't really need them all.

19 So rather than kind of write a blank check at this
20 point, that's something if you really feel a strong need later
21 on for one or two, it may be that you can reach agreement on
22 that. And if not, then we can address it in the context of
23 what actually has been done and why more is --

24 With respect to the discussions concerning ESI,
25 custodians, sources to be explored -- and I'm setting aside the

1 imaged ones because there is a whole lot more than those that
2 are going to be accessed. So resolving whatever comparison
3 doesn't have to hold up negotiating what other sources are
4 looked at, what custodians, search terms, any of that. Doesn't
5 have to hold any of that. So I expect that to proceed, and I
6 expect that to proceed quickly.

7 So in terms of meeting and conferring about --
8 within -- in a genuine effort to reach agreement -- and if I
9 may diverge for a moment?

10 A genuine desire and effort to reach agreement
11 generally means, I don't get it all my way, right? Because
12 there are competing. And sometimes what that means as part of
13 compromise, as part of I know that's important to you, I don't
14 know that I care -- agree with that, but okay. But this is
15 important to me. You make compromises. That's what a genuine
16 effort to reach agreement is.

17 It isn't pounding the other side into submission.
18 I'll give up, I do whatever you want. It's to reach reasonable
19 accommodation. So I would expect you to approach it with that
20 in mind.

21 Now, with respect to a timeline, has there been -- I
22 take it, there has been no discussion about custodians yet or
23 search terms?

24 MS. McGINNIS: Not yet, your Honor.

25 THE COURT: Okay. Somebody has got to go first and

1 make a proposal, right?

2 MS. McGINNIS: Uh-huh.

3 THE COURT: So I would normally say, it should be the
4 plaintiff, at least for your devices. I mean, for Mr. Fox
5 that's not so much an issue. In part because they are your
6 systems. They are your people. And you in the first instance,
7 you know, ought to have some knowledge about that.

8 So in terms of proposals as to what sources to look at
9 and what custodians and what time period, okay, recognizing
10 what time period you sought discovery for.

11 MS. McGINNIS: Sure. That's -- that's no problem.

12 THE COURT: Okay. When can you get a proposal over to
13 the defense?

14 MS. McGINNIS: Custodian and search term proposal?

15 THE COURT: No, no, just right now, let's focus on
16 custodian, sources, type.

17 MS. McGINNIS: Oh, we can do that next week, your
18 Honor.

19 THE COURT: Seven days?

20 MS. McGINNIS: Yeah.

21 THE COURT: Okay. Now, in terms of search terms, does
22 the defense have a view about who should go first on that?

23 MR. MAXWELL: Adam Maxwell, your Honor. No.

24 THE COURT: Okay.

25 MR. MAXWELL: No view.

1 THE COURT: Are you -- on the plaintiff's side, are
2 you willing to propose that?

3 MS. MCGINNIS: We are, your Honor.

4 THE COURT: Could you do it in that same timeframe?

5 MS. MCGINNIS: We can, your Honor.

6 THE COURT: Okay. So October 27 -- I'm sorry --
7 September 27 plaintiff will deliver a written proposal as to
8 custodians to search, search terms, which would cover all the
9 devices, plaintiff and defense, and timeframe, and sources.
10 Then how long do you need to get back to the plaintiff
11 with any suggested additions, revisions?

12 MR. MAXWELL: Your Honor, Adam Maxwell on behalf of
13 Mike Fox.

14 It depends on the number of custodians. The
15 allegations in the complaint suggest that Mr. Fox supervised 50
16 people. If they produce 50 custodians with search terms, I
17 would say 21 days. If it's less, less time.

18 MS. MCGINNIS: For clarification, your Honor, you are
19 not asking us to actually produce the documents. You are
20 asking us to suggest which custodians --

21 THE COURT: Talking --

22 MS. MCGINNIS: -- and sources.

23 THE COURT: -- about which custodians.

24 So I guess if they said, all 50, then there is not
25 much for you to add for custodians. So I guess I don't

1 understand why that would require more time. We know, at least
2 from request for production 31 to 42, that there is about a
3 dozen people that, based on those discovery requests, they
4 thought might be important. If they listed 20, Mr. Fox knows
5 who he worked with. If he says, you know, I think there ought
6 to be more. Here is why I think there ought to be more. Does
7 it really take three weeks to do that?

8 MR. MAXWELL: No, your Honor.

9 THE COURT: Okay.

10 MR. MAXWELL: Probably, seven to ten days --

11 THE COURT: Okay.

12 MR. MAXWELL: -- would be fine.

13 THE COURT: Okay.

14 MR. MAXWELL: Your Honor, just to clarify --

15 THE COURT: And search terms.

16 MR. MAXWELL: Yes, your Honor.

17 Just to clarify, it's not necessarily just people that
18 Mr. Fox supervised. It's also people above.

19 THE COURT: Oh, I know. You know, I understand that
20 he's not limited by who they think they should search. But all
21 I'm saying is whether there are people you report to, whatever
22 the organizational structure is, he is going to know that. So
23 I -- I didn't think that you needed three weeks.

24 So if you want seven to ten days, if we say the 27th
25 for the plaintiff to provide this, then how about by the 6th of

1 October you'll provide.

2 MR. MAXWELL: Agreed, your Honor.

3 THE COURT: And I want to mention that when I set
4 those kinds of deadlines, that doesn't preclude anybody from
5 doing it early. I know almost nobody files a brief earlier
6 than the deadline. I know the work expands to fill the time
7 allotted. But if you can do it faster, do it faster.

8 And then I would like the parties to meet and confer
9 about any variations there are in the two proposals. I'd like
10 that to take place the following week. If we said by mid-week
11 the next week, can you do that? That would be October 11?

12 MS. MCGINNIS: Of course, your Honor.

13 MR. MAXWELL: Yes, your Honor.

14 THE COURT: Okay. Now, do I need to have you do it in
15 the presence of a court reporter?

16 MS. MCGINNIS: No, your Honor, that's not necessary.

17 MR. MAXWELL: I don't think that's necessary at this
18 point, your Honor.

19 THE COURT: Okay. I'll accept that. But I -- I did
20 grow up in this area.

21 MR. MAXWELL: So did I, your Honor.

22 THE COURT: Where?

23 MR. MAXWELL: St. Louis.

24 THE COURT: Me too. University City. The
25 significance, of course, is that Missouri is the show-me state.

1 So show me.

2 Now, with that timeline, and then if you have
3 agreements after that, it's kind of easy. If you don't have
4 agreement, then it's a little more complicated.

5 Now, I'm going to be out from the 17th to the 30th.
6 If you want, I'll see you on the 16th, if that's enough time
7 for you to vet this process.

8 MS. McGINNIS: I think we can -- I think we can
9 definitely do that, your Honor.

10 THE COURT: Okay. Jenny, do I have anything at 9:00
11 o'clock?

12 THE CLERK: Yes, there is (inaudible).

13 THE COURT: Pardon me?

14 THE CLERK: You do. You have two status hearings at
15 9:00.

16 THE COURT: In which case?

17 THE CLERK: Ronin and Gage. Actually three. Sorry.
18 Strabala as well.

19 THE COURT: What's the last one?

20 THE CLERK: I'm sorry?

21 THE COURT: What was the last one?

22 THE CLERK: Strabala versus Zhang.

23 THE COURT: Okay. I'll see you at 9:00 o'clock on the
24 16th.

25 So what I want by noon on the 13th is a report on what

1 agreements you have reached with respect to the ESI search and
2 what areas of disagreement there are. I would also like by
3 that time a report on what agreements you reached in terms of
4 what third party -- if I haven't received it already. Actually
5 let me amend that.

6 I'd like you to move faster on this issue of finding
7 this expert as a consultant that StoneTurn and DTI would select
8 to do this comparison and the protocol for accomplishing it. I
9 want to get a report on that by noon on Friday the 6th.

10 Now, in terms of the rest of the schedule, let's
11 assume that you have complete agreement on the terms and
12 everything by your meet and confer on the 11th. Or happy
13 world, you don't even need a meet and confer. Then you got to
14 do the -- you know, the sample run.

15 Now, if that requires some adjustment of the terms
16 before running against the whole database, or the databases,
17 then realistically when looking at MiMedx, because you have
18 more sources, when -- how long from the time that you actually
19 have that -- the terms, to running them, to reviewing the
20 documents, produce them?

21 MS. McGINNIS: Shanon McGinnis, your Honor.

22 In part I think it's going to depend on -- on the
23 volume. I can tell you that -- that we have already
24 gathered -- because we are in litigation in other places.

25 THE COURT: Yes.

1 MS. MCGINNIS: We have already gathered documents
2 from -- from certain custodians and source. So some of those,
3 to the extent that we've already got it, we can produce that
4 relatively quickly, as long as the -- it's the same search
5 terms.

6 THE COURT: It's probably not going to be less than 30
7 days.

8 MS. MCGINNIS: Right.

9 THE COURT: All right. I'm just running the numbers
10 because that's probably going to take us to the end of
11 November.

12 MS. MCGINNIS: Uh-huh.

13 THE COURT: Is January 15 reasonable to finish
14 everything? I'll ask a rhetorical question.

15 By the way, in those other cases, did you do -- use
16 search terms?

17 MS. MCGINNIS: Yes, your Honor, we did.

18 THE COURT: Okay. So that may facilitate use of them
19 here.

20 MS. MCGINNIS: Exactly.

21 THE COURT: At least what you propose.

22 Here is what I am going to do with respect to the
23 discovery schedule. It seems to me that if everything goes as
24 smoothly as possible, we are not going to be through this ESI
25 phase for two months. It's going to take us to the end of

1 November. And then we're going to talk about scheduling
2 depositions, because generally you are not going to do a lot of
3 that before you get the documents.

4 So it seems to me that what would make sense right now
5 is to pick the date suggested by the defense of April 13 for
6 the close of the non-retained expert fact discovery. Then with
7 respect to experts, on the plaintiff's side what's your
8 expectation as to the number of experts?

9 MS. MCGINNIS: I think at this point, your Honor,
10 maybe one or two experts.

11 THE COURT: And on the defense side?

12 MR. MAXWELL: Probably leave that up to Mr. Premo.
13 Mr. Premo?

14 MR. PREM0: I think -- this is Steven Premo, your
15 Honor.

16 I think two experts at most.

17 THE COURT: Okay. So what I would think would make
18 sense here is to kind of shorten a little bit the proposal that
19 you had for the time for experts. I think that the proposal
20 was 60 days after the close of discovery for any expert on
21 which the party has the burden of proof. I think that what
22 would make sense here is to shorten that a little bit. I don't
23 see why that can't be done in 30 days. So I would say May 14.

24 And in order to facilitate the responding reports,
25 May 15 -- May 14, I should say, is for the Rule 26(a)(2)

1 reports. What I will require is that by April 27 anybody who's
2 going to serve a report on May 14 disclose the identity of the
3 expert or experts and at least the subjects of the reports. So
4 that to the extent somebody didn't have in mind having an
5 expert on that subject and they decide they wanted to, they
6 would be able at least to make that judgment before getting the
7 report. Because what I am going to do is hold to the 30 days
8 for any rebuttal or responsive reports. So those will be due
9 June 13.

10 And then the depositions of any experts are to be
11 completed by July 13. Given the number of experts, I think 30
12 days is plenty of time to do it.

13 With respect to deadlines to amend pleadings, I think
14 that the proposal was 60 days before the close of discovery, is
15 that right?

16 MS. McGINNIS: Forty-five days --

17 THE COURT: Forty-five.

18 MS. McGINNIS: -- close of fact discovery.

19 THE COURT: That's fine. So let's make it February
20 28. I'm going to short you by two days. Okay?

21 I am not going to set any dispositive motion
22 deadlines. We're so far away from that, and it may be that
23 those aren't something that are appropriate once everybody has
24 seen all the discovery. But if there are dispositive
25 deadlines, I think that that's something for Judge Shah to set.

1 I'm not going to presume to set the schedule to bind him on --
2 on that issue.

3 I think the only other matters raised, one of them was
4 with respect to the motion for protective order that I have
5 already ruled on. Another was the location of depositions of
6 certain MiMedx people. And I guess at this point I don't view
7 that issue as ripe.

8 All right. Is there anything else with respect to the
9 report or scheduling that you think we need to discuss this
10 morning? Discovery schedule.

11 MR. GRIESMEYER: As far as scheduling goes -- I'm
12 sorry. Chris Griesmeyer on behalf of Mr. Fox.

13 As far as scheduling, scheduling on the motion to
14 quash.

15 THE COURT: Right. That I was going to turn to in a
16 moment. How does the plaintiff want to handle this? Do you
17 want to brief it? You want to argue it?

18 MS. MCGINNIS: The motion to quash, your Honor?

19 THE COURT: Yes.

20 MS. MCGINNIS: I'm sorry. We can just argue it, your
21 Honor.

22 THE COURT: Okay. We're not going to do that today.
23 So --

24 MS. MCGINNIS: Your Honor, if we're not going to do
25 that today, we -- we will take an opportunity to do a written

1 response. Yeah, it won't be long.

2 THE COURT: Okay. That's fine.

3 Jenny, what's my schedule look like next Wednesday?

4 THE CLERK: You have status hearings at 9:00 o'clock,
5 and the status and ruling at 10:00 o'clock.

6 THE COURT: Which case is that in?

7 THE CLERK: That one is on Jain versus Butler.

8 THE COURT: Okay.

9 THE CLERK: Then a settlement conference at 1:30.

10 THE COURT: 11:00 a.m. on the 27th. Can you do your
11 response -- how long do you want to do response?

12 MS. MCGINNIS: Today is what, Wednesday?

13 THE CLERK: Today is Wednesday.

14 MS. MCGINNIS: Don't know what day it is.

15 I definitely get it to you by Monday. We may be able
16 to get it to you by Friday, your Honor.

17 THE COURT: Okay.

18 MS. MCGINNIS: I like to have until Monday, if
19 that's --

20 THE COURT: Monday, Monday noon?

21 MS. MCGINNIS: Yes, sir.

22 MR. MAXWELL: Your Honor, I apologize. You said the
23 27th? I have a dental appointment that morning. I hope it's
24 uneventful, but I do have the appointment.

25 THE COURT: What time?

1 MR. MAXWELL: It's at 8:00 a.m.

2 THE COURT: Is it downtown?

3 MR. MAXWELL: No, your Honor. It's over in Irving
4 Park, Edgewater area.

5 THE COURT: Okay. So you don't think you can be here
6 by 11:00?

7 MR. MAXWELL: Oh, I'm sorry. I thought you said 9:00
8 a.m.

9 THE COURT: No, 11:00.

10 MR. MAXWELL: 11:00 a.m. is fine, your Honor.

11 THE COURT: Is that okay? Are you sure?

12 MR. MAXWELL: Yes.

13 THE COURT: You're not going to be numbed up so you
14 won't be able to articulate?

15 MR. MAXWELL: I hope not.

16 THE COURT: Okay. All right. And why don't we say
17 you can give me any response in writing by noon on the 25th.
18 Okay?

19 MS. MCGINNIS: Thank you, your Honor.

20 THE COURT: One thing that would be useful to address
21 in the response, because I will ask you about it, and that is
22 in terms of Exhibit D, which reflected certain competing
23 compromise proposals, what each of you perceive as the
24 difference in the competing proposals that leads you not to
25 agree on one of them. Okay?

1 MS. MCGINNIS: Thank you, your Honor.

2 MR. PREM0: Yes, your Honor.

3 THE COURT: All right. Then I will see you next on
4 the 27th. Thank you.

5 MR. MAXWELL: Thank you, your Honor.

6 MS. MCGINNIS: Thank you.

7 THE CLERK: Court stands in recess.

8 (Which were all the proceedings heard in this case.)

9 CERTIFICATE

10 I HEREBY CERTIFY that the foregoing is a correct
11 transcript from the digital recording of proceedings had at the
12 hearing of the aforementioned cause on the day and date hereof,
13 to the best of my ability given the limitations of using a
14 digital recording system.

15

16 /s/Alexandra Roth

10/23/2017

17 _____
Official Court Reporter
U.S. District Court
18 Northern District of Illinois
Eastern Division

Date

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